



November 19, 2002

Mr. Kuruvilla Oommen
Assistant City Attorney
Legal Department
City of Dallas
P.O. Box 1562
Houston, Texas 77251-1562

OR2002-6601

Dear Mr. Oommen:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 172364.

The City of Houston (the "city") received a request for Office of the Inspector General files concerning three specific firefighters. You inform us that you have no responsive information relating to one of the firefighters. You also tell us that you have released some of the requested information. You claim that the remaining requested information is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 143.089 of the Local Government Code. We have considered the exception you claim and reviewed the submitted sample of information.¹

Initially, we address the city's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples,

¹ We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

labeled to indicate which exceptions apply to which parts of the documents. You did not, however, submit your arguments or the specific information requested within fifteen business days of receiving the request.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). As section 552.101 of the Government Code provides a compelling reason to overcome the presumption of openness, we will address your argument under that exception. *See* Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests).

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes, such as section 143.089(g) of the Local Government Code. Section 143.089 of the Local Government Code provides in pertinent part:

(a) The director [of the fire fighters' or police officers' civil service] or the director's designee shall maintain a personnel file on each fire fighter and police officer. The personnel file must contain any letter, memorandum, or document relating to:

...

(2) any misconduct by the fire fighter or police officer if the letter, memorandum, or document is from the employing department and if the misconduct resulted in disciplinary action by the employing department in accordance with this chapter ...

...

(g) A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a fire fighter or police officer. The department shall refer to the director or the director's designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file.

Thus, section 143.089 contemplates two different types of personnel files, a fire fighter's civil service file that the civil service director is required to maintain, and an internal file that the fire department may maintain for its own use. Local Gov't Code § 143.089(a), (g). In cases in which a fire department takes disciplinary action against a firefighter, it is required by section 143.089(a)(2) to place records relating to the investigation and disciplinary action in the fire fighter's civil service file maintained under section 143.089(a). Such records are subject to release under chapter 552 of the Government Code. See Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990). However, information maintained in a fire department's internal file pursuant to section 143.089(g) is confidential and must not be released. *City of San Antonio v. Texas Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.--Austin 1993, writ denied).

You assert that Exhibit 3 contains reports of allegations that were sustained in part. You tell us that the allegations that were not sustained did not result in discipline. You further argue that because the allegations that were sustained are so intertwined with the allegations that did result in disciplinary action, all of the allegations should be considered confidential under section 143.089(g) and withheld under section 552.101. However, we interpret section 143.089(a)(2) to mean that all information relating to any misconduct resulting in disciplinary action as defined by chapter 143 must be placed in the civil service file. Furthermore, you assert that the requested information is confidential under section 143.1214 of the Local Government Code.² Again, this section makes confidential only the portions of the reports pertaining to allegations that were not sustained. To the extent that allegations were sustained and resulted in disciplinary action as contemplated by chapter 143, they must be released. Thus, the city must redact those portions of the report pertaining to the unsustained charges or those not resulting in chapter 143 discipline and release the rest of the report.

You assert that the allegations of misconduct contained in Exhibit 2 have not resulted in disciplinary action. Having reviewed the information, we conclude that the documents in Exhibit 2 are confidential pursuant to section 143.089(g) and must be withheld. However, we note that report number 02-100 contains an allegation that was sustained. If the sustained allegation resulted in discipline as contemplated by chapter 143, that portion of the report must be released as discussed above because it is not confidential under either section 143.089(g) or section 143.1214.

² Section 143.1214 provides in pertinent part:

The department shall maintain . . . any document in the possession of the department that relates to a charge of misconduct against a firefighter . . . that the department did not sustain, only in a file created by the department for the department's use. The department may not release those documents to any agency or other person except another law enforcement agency or fire department.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, reading "Jennifer E. Berry".

Jennifer E. Berry
Assistant Attorney General
Open Records Division

JEB/sdk

Ref: ID# 172364

Enc: Submitted documents

c: Mr. Jeffrey L. Dow
11136 Cedarview
Houston, Texas 77041
(w/o enclosures)